IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney-General, as Successor to the Alien Property Custodian,

Petitioner,

v.

UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

BRIEF *AMICUS CURIAE* FOR THE NATIONAL FOREIGN TRADE COUNCIL, INC.

WM. HARVEY REEVES,
Counsel for Amicus Curiae The National Foreign Trade Council, Inc.

CHARLES R. CARROLL.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Scope of the Brief	1
The Issues	2
Summary of Argument	4
Argument	
I. The 1941 War Legislation was intended to provide authority for conservation and preventive measures, but not for permanent retention of property of non-enemy aliens	5
II. To deny a friendly alien the right to reclaim his property is contrary to the policies of the United States and to the fundamental concepts of the Constitution	14
III. The denial of the right of an alien to have the courts determine his status as a friendly or enemy alien is contrary to the Treaties of Friendship	18
IV. The decision of the Court of Appeals should be affirmed	21

LIST OF CITATIONS AND REFERENCES:

Cases.

Becker Steel Co. v. *Cummings* (1935), 296 U. S. 74	16
Markham v. *Cabell* (1945), 326 U. S. 404	6
Russian Volunteer Fleet v. *United States* (1931), 282 U. S. 481	16
U. S. v. *Chemical Foundation* (1926), 272 U. S. 1	9
United States v. *United Mine Workers of America and Lewis* (Decision announced March 6, 1947)	15

Statutes and Regulations.

PAGE

An Act to Improve the Administration of Justice by Prescribing Fair, Administrative Procedure (c. 324, P. L. 404) 14, 15, 16
Act of August 8, 1946, c. 878, P. L. 671 13
Executive Order No. 8389, 5 F. R. 1400, as amended .. 7
Executive Order No. 9095, 7 F. R. 1971 8
Trading With the Enemy Act, 50 U. S. C. App. §1 (1940), as amended by Title III of the First War Powers Act of 1941, 50 U. S. C. App. §1 (Supp. 1946) 3, 4, 5, 6, 7, 8, 9, 12, 13, 15, 16

Treaties.

Treaty of Commerce and Amity with Switzerland, 1850, 11 Stat. 587 ..... 4, 18, 19

Congressional Documents.

Hearings on HR 5089, 79th Congress, Second Session, p. 9, Letter of James E. Markham 10
H. R. 2398 13
H. R. 3750—79th Congress, First Session, reintroduced as H. R. 4571—79th Congress, Second Session 11
H. R. 5089 reintroduced as H. R. 6980—S. 2378 12

Constitution.

United States Constitution, Fifth Amendment 4, 16

Article.

Nussbaum, American-Swiss Private International Law, 47 Col. L. Rev. 187 (1947) 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney-General, as Successor to the Alien Property Custodian,

Petitioner,

v.

UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

BRIEF *AMICUS CURIAE* FOR THE NATIONAL FOREIGN TRADE COUNCIL, INC.

Scope of the Brief.

The principal concern of the *Amicus Curiae* is in the effect that a decision in this case must inevitably have upon United States trade with all countries of the world with which the United States does business or hopes to do business and upon the status of American property within those countries.

The Court is here called upon to interpret a Federal statute as it applies to certain property within the United States owned by a non-enemy alien. In doing so this Court must deal with such property and interests generally in the United States. The policy in respect to such property is enunciated in relevant constitutional, treaty or statutory provisions only the last of which are emergency war legislation. The decision of this Court will doubt-

less be read and examined with the keenest interest throughout the world; and the conclusions in this case will have an important influence upon the development of future policy and procedure necessary to resolve the complicated problems of readjustment of property rights and commercial obligations affected by war and war measures. It can be assumed that our attitude will be reflected in that of foreign governments toward American property similarly affected—either in emulation or by way of retaliation.

It is not considered appropriate to this brief to discuss the facts or the legislative history of the Statute under consideration, since these matters will be presented to the Court in the briefs of the parties to the action. Our purpose is to present to the Court certain considerations which we regard as of general interest and significance to the business community, and particularly that segment of it engaged principally in international trade. As our traders and investors wish to be secure in their persons and property in their ventures in foreign lands, they are concerned that corresponding security be afforded nationals of those lands as to their persons and property in this country. Such security must be, and in our opinion is, afforded only when reinforced by access to courts of justice on the same basis as citizens.

The Issues.

Owing to the manner in which this case comes up to this Court, the issues have been reduced to a limited and definite compass. By the granting, without opinion, of a motion to dismiss the complaint, the District Court denied the plaintiff, a Swiss corporation, the remedy of a judicial review of the propriety of the taking of its property by the Alien Property Custodian, and of judi-

cial determination whether it is entitled to recover the "vested" property. The Court of Appeals, holding the lower Court in error, reversed and remanded the case. Thus the issue before this Court is simply whether, in a situation such as this, a Swiss national, or any other non-enemy national, shall have his day in court or shall not have it.

This Court is not, at this time, confronted with any issue as to the propriety of the taking, or as to the ultimate right of the claimant to have his property back. The effect of the motion to dismiss is, for our purposes, to admit the plaintiff's allegations, and argue that, even admitted, no cause of action is pleaded which the Court may entertain.

The alien proprietor has been deprived of property by an act of an administrative agency, and now seeks a judicial direction for its return. The agency (the Office of Alien Property, as successor to the Alien Property Custodian) having the property is not content to submit its administrative action to judicial review, but insists that having made an *ex parte* determination and acted thereon, the deprivation must stand forever, unless the agency in its uncontrolled discretion and solely as a matter of grace, should re-examine its own conclusion and find that return of the property is "in the interest of the United States". The Custodian suggested, in palliation, that a claim for "just compensation" may be sued out in the Court of Claims.

In terms of the statutory provisions involved, the issue may be stated as whether or not paragraph 5 (b) of the Trading With the Enemy Act, as amended by Title III of the First War Powers Act of 1941, deprives non-enemy aliens of the remedy of judicial review and relief accorded them by paragraph 9 (a) of the Trading With the Enemy Act; and, related intimately to this question, the issue

whether, if paragraph 5 (b) be so interpreted, it is repugnant to the Fifth Amendment to the Constitution of the United States, and so void, and the further issue of whether it is in derogation of provisions of our Treaty of Commerce and Amity with Switzerland, of 1850.

Any other specific issues raised are, in the opinion of the *Amicus*, collateral or subordinate to those referred to above. This seems to have been the prevailing view in the Circuit Court of Appeals.

Summary of Argument.

I. The 1941 War Legislation was intended to provide authority for conservation and preventive measures, but not for permanent retention of property of non-enemy aliens.

II. To deny a friendly alien the right to reclaim his property is contrary to the policies of the United States and to the fundamental concepts of the Constitution.

III. The denial of the right of an alien to have the Courts determine his status as a friendly or enemy alien is contrary to the Treaties of Friendship.

IV. The decision of the Court of Appeals should be affirmed.

POINT I.

The 1941 War Legislation was intended to provide authority for conservation and preventive measures, but not for permanent retention of property of non-enemy aliens.

The *Amicus* assumes that the legislative history of the First War Powers Act, and the related Executive Orders, will have been adequately covered elsewhere than in this brief. It is nevertheless relevant to point out summarily certain differences between the historical facts which form the background of this legislation, and the essential premises of the Custodian's arguments. Also, certain differences between the situation in World War I and that in World War II are notable and essential to a clear understanding of the implications of the statutory provisions.

(a) In World War I, this country became a belligerent in April, 1917, and a comprehensive Trading With the Enemy Act was enacted October 6, 1917. The statutory Custodian was given the right under Section 6

> "to receive all money and property in the United States due or belonging to an enemy, or ally of enemy * * * and to hold, administer, and account for the same under the general direction of the President and as provided in this Act."

The words "enemy" and "ally of enemy" were explicitly defined in Section 2 of that Act. Section 7 (c), as amended, authorized the President to require the transfer to, or the Alien Property Custodian to "seize" enemy or ally of enemy property. Sections 8 and 9 provide for judicial review, and in proper cases, relief, to

> "any person not an enemy or ally of enemy"

in respect of any property or interest affected.

The simplicity of these statutory provisions is concealed by their elaborate wording, but the result is positive: any person, citizen or alien, title claimant or creditor, was afforded the remedy of a judicial determination of whether he was or was not an "enemy or ally of enemy" and if he was not, he received back his property or collected his debt, or established his lien, as the case might be.

All of these sections, however amended, are still in force and effect. Naturally only when this country is at war and has "enemies" can seizures be made, but remedial provisions such as 9 (a) are in effect until their remedial purpose has been accomplished, or some statutory prescription has run.

Markham v. *Cabell*, 326 U. S. 404.

At this writing we are not at war with Switzerland, so Swiss nationals are neither enemies nor allies of enemies.

(b) As to World War II, this nation formally became a belligerent in December, 1941, and the First War Powers Act, incorporating the amended version of Section 5 (b) of the Trading With the Enemy Act became law December 18, 1941. This section included the power to

> "investigate, regulate, direct and compel • • • any acquisition • • • of • • • any right, power or privilege with respect to • • • any property in which any foreign country or a national thereof has any interest, • • •"

and provides that when so ordered, any such property

"shall vest * * * in such agency"

as might be designated, to be held or otherwise dealt with

"in the interest of and for the benefit of the United States, * * *"

The Alien Property Custodian has taken the position that "vestings" in World War II are by virtue of this provision, rather than under the previously enacted Section 7 (c). Thus, in order to vest property, it was no longer necessary to find that it was owned by an "enemy or ally of enemy", but it was customary to recite in vesting orders that such action was deemed

"necessary in the national interest."

It is necessary to observe that upon its issuance April 10, 1940 and by virtue of Executive Order 8389, blocks had been set up on property and interests of nationals of certain "designated" countries, under what was known as "foreign funds control". As German military operations expanded, the list of designated countries lengthened. This list eventually included not only enemy or ally of enemy countries and enemy-held countries, but nearly all countries of the world including neutrals and our own allies. The broad wording of Section 5 (b), must thus be attributed to a desire for legislative ratification of this regime, although we may concede a conscious intent to authorize as drastic controls over all alien property as might be necessary, once this country became a belligerent.

Specifically, Switzerland was made a "designated foreign country" on June 14, 1941, within the meaning of Executive Order No. 8389, as amended, but at no time have its nationals been "enemies" or "allies of enemies" simply by reason of nationality.

The "interest of the United States" as this concept appears in the First War Powers Act amending Section 5 (b) of The Trading With the Enemy Act is not, as has been contended, to be construed *in vacuo*.

The purpose of Foreign Funds Control was originally to prevent the German authorities from acquiring by duress, and utilizing, the resources of the governments and nationals of invaded areas, and conserving those resources for their true owners. When this nation became a belligerent, there was added to this preventive motive, the traditional "interest" of preventing the enemy government from marshaling or utilizing *any* resources within our jurisdiction or control, for the conduct of hostilities against this nation. This concept was, to be sure, expanded into that of full-scale "economic warfare" as the military situation deteriorated, but this development should not now confuse our thinking. The sequestration of property authorized during the period of actual hostility, should not be crystallized into a permanent policy, now that hostilities have ended and there is obviously no real danger that any funds or property can be availed of by the enemy against "the interest of the United States".

During the war, although the Foreign Funds Control "froze" foreign assets here, there was no substantial "vesting" of non-enemy property, other than patents and intellectual property. Nor, it would seem, was vesting necessary or intended, in view of the limitations upon the delegation of authority to the Alien Property Custodian, to be found in Section 2 of Executive Order No. 9095 of March 11, 1942. In case of such vesting, the Custodian first had to determine that such action was in the interest of the United States.

Taking these circumstances in the aggregate, there is no basis for the assumption that Congress in its very broad grant of power to the Executive in the first weeks

of this War, intended to authorize confiscation, or even general expropriation, of non-enemy property. If it did, its publicly expressed concern over the plight of citizens of the invaded countries was the height of hypocrisy, and irresponsible disregard of constitutional safeguards and treaty obligations. Such an attitude of hypocrisy, should not be attributed to our national legislature, in the absence of compelling proof—and such proof has not been adduced.

Congress did, in effect, legislate to permit, and the President did authorize the exercise of the power of seizure, not alone as to enemy property, but as to property of "designated foreign nationals". One of the obvious reasons for this action was that in the case of any person, citizen or alien, his loyalty might be suspect, or his "hostility" might be considered sufficiently dangerous that the preventive sequestration of his property was justified. The occasion for this extreme discretionary power has definitely passed with the close of hostilities. Whatever criteria were applied in determining "the national interest", their application should now be subject to judicial review and reinterpretation in more sober fashion. If this had not been intended, it is pertinent to suggest that the agency concerned, or Congress, should have given some thought to amending Sections 8 and 9 of the principal Act.

So, while the categories of persons whose property became subject to taking was largely expanded, it does not follow that the "vesting" of World War II was different in legal concept or effect from the "seizure" of World War I. This the Alien Property Custodian has denied, and has contended that "vesting" is conclusive and final, whereas "seizure" was not. The *Amicus* believes that he is in error on both counts. Certainly this Court, in *U. S.*

v. *Chemical Foundation*, 272 U. S. 1, held that seizure of enemy property was so effective as to permit good title to be transferred. And the Alien Property Custodian has himself argued before Congress that he cannot rely upon the validity of his own "vesting" if it is questioned by suit, and hence such suits should be barred.

(Hearings on HR 5089, 79th Congress, Second Session, p. 9, letter of James E. Markham)

We believe the Custodian has been confused by the concept of "transfer of title", and has been more conscious of his powers and prerogatives than of his duties and responsibilities to the beneficial owners of property coming into his possession and control. He has appeared to construe "the interest of the United States" in the narrow sense of immediate pecuniary interest of the government, which naturally implies the retention of whatever of value may have been acquired during the War. This would take no account of the major "interest" which was winning the War, and should be now a wholehearted recognition and implementation of those rights of the individual which we trust our success in the War will preserve. It is not enough, indeed, that the interpretation of this latter "interest" should be entrusted to the uncontrolled discretion of an agency which has for five years exercised plenary powers over private rights and interests. It is essential that the salutary process of judicial review should be given the broadest possible play.

We submit that it was not the intent of Congress at any time to deny to non-enemy aliens access to our courts to support their claim to recapture their property. The *Amicus* is not pleading the cause of enemy alien owners of vested property, since the ultimate disposition of that property has still to be legislated. Nor, in this case at

its present juncture, is the issue of the actual return of the non-enemy property before the Court. We simply contend that the retention by the Custodian of any person's property, without opportunity for judicial review of the propriety of such retention, amounts to confiscation, and cannot be

> "necessary in the national interest."

The Custodian, on the other hand, apparently believes that no alien, friendly or otherwise, has a right to court review of the Custodian's exercise of discretion. He argues that the process of "vesting" is complete and perfect in itself.

That the Custodian has not too great confidence in this position is shown by his course in the last few years. Claiming that he could not otherwise divest the Federal Government of title to property taken and yet admitting that certain property he had vested should be returned, the Custodian asked Congress for additional legislation. The then Custodian sponsored a bill, H. R. 3750—79th Congress, First Session, reintroduced as H. R. 4571—79th Congress, Second Session. This legislation was permissive in form and was worded so that the return of non-enemy property should have the sanction of Congress. On the hearing of this bill (H. R. 3750) the Department of State sent a communication reading in part as follows:

> "It has become increasingly apparent that if serious embarrassment is to be avoided the property so vested must be returned." (Record of hearings—Page 3.)

The reference is to property other than enemy property and property vested for reasons other than that it was enemy. The proposed legislation as drawn sanctions the return of property of non-enemies but does not require

the return of property of non-enemies whom for one reason or another, the Custodian may regard as "hostile"; which is to say, in effect, persons ineligible by certain criteria set by the Custodian. Property may be returned under the terms of this legislation, upon a finding by the Custodian *inter alia*

> "(3) that the property or interest claimed * * * was not * * * held or used * * * pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a)(2) hereof;" [an enemy interest or its equivalent,] "and
>
> (5) that such return is in the interest of the United States".

The National Foreign Trade Council, Inc., *Amicus*, appeared at these hearings, and while not opposing this legislation, pointed out several defects in it, one of which was that it did not cover such situations as we have in case at Bar. The legislation was enacted as the Act of March 8, 1946 and is now Section 32 of the Trading With the Enemy Act. The Custodian then proceeded to introduce legislation which would have, in effect, converted these criteria under this permissive section into restrictive criteria. The new bill contained among other provisions the following (H. R. 5089 reintroduced as H. R. 6890—S. 2378):

> "Sec. 33. (a) A foreign country or national thereof as defined pursuant to section 5 (b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9 (a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or in-

terest acquired by the United States prior to December 18, 1941), or the net proceeds thereof".

In the several hearings on this Bill, both before the House and in the Senate the National Foreign Trade Council, Inc. appeared, strenuously objected and filed a brief of its objections in both Houses. This legislation did pass the House (Report No. 2398) but the Committee on the Judiciary of the Senate accorded a hearing and struck out the Section 33 (a) to which the *Amicus* had filed its objections. In conference, the House receded, and the extensive amendments to the principal act were passed without this feature. (Act of August 8, 1946 adding Sections 33 to 37 inc.)

The Custodian, having thus failed to induce Congress to legislate his unacceptable provision of law, is now, somewhat inconsistently, urging before this Court that, after all, it was the law all along, and in effect urges a confirmation of this discretionary power. The *Amicus* does not feel that, if any real doubt existed at any time, the Court should be inclined to sanction by interpretation, a position which the Congress has definitely declined to sanction by legislation.

The correct position, it would seem, is that any person not an enemy or ally of enemy should, as intended by Section 9 (a), be given his day in court and a full opportunity, on a proper showing, for such relief as is appropriate to his particular situation, including the return in specie of his property. This, we believe, is the only position consistent with our Bill of Rights, our treaty obligations, and "the national interest" as that phrase should be construed.

POINT II.

To deny a friendly alien the right to reclaim his property is contrary to the policies of the United States and to the fundamental concepts of the Constitution.

The last Congress passed an act entitled "An Act to Improve the Administration of Justice by Prescribing Fair Administrative Procedure" (c. 324, P. L. 404). The attention of this Court is directed to this salutary legislation. In particular, the *Amicus* refers to § 10, paragraph (e):

> "e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court

> shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (60 Stat. 243).

Particularly is the *Amicus* interested in the above numbered provisions "5" and "6". Here the Court to which application is made, should determine whether or not the action of the Agency (in this case, the Custodian) is in fact supported by substantial evidence, and should ultimately substitute for a determination by the agency the decision of the Court, after probative facts have been freely presented by both of the parties.

There is no reason to believe that the Custodian was intended to be immune from the provisions of this administrative act, since the rules are clear for the review of just such an act as is here before the Court. This conforms to the statements contained in a recent decision of this Court.

> "Every act of government may be challenged by an appeal to law as finally pronounced by this Court. * * * When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy." (Concurring opinion of Mr. Justice Frankfurter in *United States* v. *United Mine Workers of America and Lewis*, decision announced on March 6, 1947.)

The procedure set forth in the Administrative Procedure Act is an implementation of the due process clause of our Constitution. The remedy afforded by § 9 (a) of the Trading With the Enemy Act is adequate to meet

the constitutional requirements and the procedure set forth in the Act above quoted.

Becker Steel Co. v. *Cummings*, 296 U. S. 74;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481.

In fact if 9 (a) was nullified by the subsequent enactment of the First War Powers Act, as contended by the Custodian, the Administrative Procedure Act which became law but recently would grant a new and independent right of action to review the Custodian's seizure and withholding.

A still further reason why the Custodian's position is untenable is his unwarranted assumption that a cause of action for compensation before the Court of Claims would be an adequate remedy to meet the Constitutional requirements of "due process."

The Fifth Amendment says:

> "No person shall • • • be deprived of life, liberty, or property, without due process of law;"

And it also says:

> "nor shall private property be taken for public use, without just compensation."

The Amendment does not justify the assumption, apparently made by the Custodian, that depriving a person of property without due process of law (which is invalid in itself) may be made less offensive when, by the award of compensation, its taking is removed from the second and independent prohibition.

The Custodian's refusal to return the property, makes "vesting" a permanent seizure *ab initio* and gives rise to the observations that the property was taken without

notice, or hearing, and for no announced purpose or reason. The prohibition against deprivation without due process of law is complete; it is not conditional or discretionary merely if a possibility for compensation therefor exists.

On his own interpretation that a right to claim for just compensation in the Court of Claims is adequate to meet all standards set by the Constitution and the administrative act, the Custodian again finds himself in logical difficulties. The reason why the property was taken is not before the Court. The minority opinion (App. D. C.) implies a possibility that the retention was on the ground the Custodian found it "hostile" property. Assuming this, if his original determination is correct, *i. e.*, that respondent here is proved to be an enemy alien, then the property is held for such future determination as may be meted out by this Government to all enemy property. If, however, the Custodian was in error, then (contrary to the Custodian's belief and intention) the property must have been taken at the time of its vesting, for a public use. At the point when the friendly alien is found by the Court of Claims to be such, and is awarded compensation, he may well ask for what public purpose his property was taken, particularly as at that point it will be clear that it was taken by mistake and inadvertence, and for no ascertainable "public use".

It is only realistic to assume that in many cases, claimants will quite naturally prefer to have their own property back, rather than any sort of "just compensation" for it. That would surely be the attitude of many American firms and individuals, with respect to their interests in foreign ventures.

POINT III.

The denial of the right of an alien to have the courts determine his status as a friendly or enemy alien is contrary to the Treaties of Friendship.

The case is a microcosm, wherein can be discussed the course of the international relations of the United States, as expressed in treaties of friendship and commerce. The alien seeking the protection of the courts, in this case, is a corporation organized and existing under the laws of Switzerland. With Switzerland, the United States has had a treaty of friendship and commerce since November 25, 1850 (11 Stat. 587), ratified November 8, 1855. The purposes of this first treaty with Switzerland are stated by Arthur Nussbaum in an article "American-Swiss Private International Law," 47 Col. L. Rev. 187 (1947), as follows:

> "The motives behind the Convention were political as well as commercial. In 1848 Switzerland had adopted a democratic and federative constitution on the American model, defying the hostile attitude of the autocratic governments of Austria, France, Prussia and Russia.[4] The Government of the United States wanted to give moral support to the democratic cause. As President Furrer of the Swiss Confederacy put it in a message to the Swiss Federal Assembly, President Taylor of the United States wished to extend to Switzerland 'a fraternal hand in the very midst of the storms with which she was threatened, and to offer her a treaty of friendship whereby the two freest peoples on earth will treat each other reciprocally on a footing of equality.'[5] A most-favored-nation clause which was embodied in the Treaty set

up a barrier against the engulfment of Switzerland in the German *Zollverein* or any other exclusive economic system.[6]

---

[4] 5 Miller [Treaties and Other International Acts of the United States of America (1937)], at 859.

[5] *Id.* at 865.

[6] *Id.* at 860-62. The American 'special agent' who rendered this report, Mr. Ambrose Dudley Mann, also mentioned that by virtue of the Treaty 'our countrymen who shall visit the Old World may find a home in its centre where they will be as well protected in their persons and their property as if they were residing in their own native land.' *Id.* at 862."

The rights of Swiss nationals are defined in Article I of the treaty of friendship above referred to, which has been in effect for nearly one hundred years. Article I of that treaty reads as follows:

"Article I (The citizens of Switzerland)

"They shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens • • •

"No pecuniary or other more burdensome condition shall be imposed • • • upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject." 11 Stat. 587.

By no stretch of the imagination can the contentions of the Custodian in regard to the property of this Swiss national be reconciled with this treaty obligation.

This nation has espoused the project of securing from other nations in the world a general adherence to those specific safeguards of individual liberty which are called

our Bill of Rights. Unless we are punctilious in our own observation of those rights where aliens and their property within the United States are concerned, our voice will carry but little authority on this point with the United Nations.

It is apparently not safe to assume that a scrupulous regard for the interests of aliens, will be found in administrative agencies. They are prone to expand their own powers and prerogatives. The larger interest of this nation, with which the *Amicus* is most concerned, is in the preservation of its reputation for integrity and even liberality in living up to its engagements, generally and in this particular field of alien interests within this government's jurisdiction. Nor is this interest purely ethical or academic, since the observance of such equitable rules will set a good example, and departures from it, on whatever specious grounds, will likewise set a bad example, which debtor nations will doubtless find it to their immediate advantage to follow. Reprisal and retaliation upon American interests abroad, or even simple imitation of a negative and legalistic interpretation of our undertakings, would mean serious damage to the solidity of our international investment position, and would set up a critical obstacle to its expansion. In the present state of our world economy, it is extremely doubtful whether the economic adjustments which need to be made, can be made in time—but it is very obvious that the assurance of integrity in international investment is a necessary element in any such process, if it is to succeed.

It is not too much to say that the attitude of this Court in the disposition of this appeal, may well contribute, either one way or the other, to success or failure in solving this problem of adjustment. The well-considered, traditional phrases of our treaties of friendship and commerce, taken at their face value, are an excellent pattern

for a constructive attitude as to the interests of aliens within our jurisdiction, and reciprocally, as to our interests within their power.

POINT IV.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

WM. HARVEY REEVES,
Counsel for Amicus Curiae
The National Foreign Trade
Council, Inc.

CHARLES R. CARROLL.

FILE COPY

Supreme Court, U. S.
FILED
APR 24 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934. 35

TOM C. CLARK, Attorney-General, as Successor to the Alien Property Custodian,

Petitioner,

v.

UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

Motion of The National Foreign Trade Council, Inc., for Leave to File a Brief *Amicus Curiae*.

To the Honorable the Justices of the Supreme Court of the United States:

THE NATIONAL FOREIGN TRADE COUNCIL, INC., respectfully moves:

That this Court grant leave to it to file a brief *amicus curiae* in the above-entitled case now before it by reason of a writ of certiorari to the Court of Appeals for the District of Columbia, duly granted by this Court on February 17, 1947, and in the hearing and determination of this case this Court consider the said brief in favor of the affirmance of the decision of the said Court of Appeals (158 F. 2nd 313). The Petitioner, Tom C. Clark, Attorney-General, has given his written consent to the submission of this brief; the Respondent, Uebersee Finanz Korporation, A. G., has not given its consent.

Since its founding in 1914, the National Foreign Trade Council, Inc., 26 Beaver Street, New York City, has served as an agency of American business in promoting and protecting the full range of American foreign commercial operations.

The nationwide membership consists of American business enterprises, encompassing firms in the export and import trades and services, owners of industrial enterprises and other properties located in foreign countries, banks, insurance companies, agricultural interests, ocean, air and railroad transportation, communications, and additional varieties of American enterprises doing business with or in foreign countries.

The issue in this case is whether or not an alien corporation admittedly organized under the laws of a non-enemy country has the right of recourse to our courts to reclaim property vested by the Alien Property Custodian.

The interest of the National Foreign Trade Council, Inc. is in the effect which a decision in this case must inevitably have on United States trade with all countries of the world with which the United States now does business or hopes to do business in the future. The Court is called upon to interpret a federal statute and define its applicability to certain alien property within the United States and in so doing must find and apply the policy of the United States in respect to all alien held property. Whatever policy is thus tacitly announced through the Court's decision here will be read and examined throughout the world. The affirmance or reversal of the decision of the Court of Appeals now to be reviewed by this Court will be accepted as a policy determination of the greatest creditor nation in the world and the decision will doubtless

be the cause of, or excuse for, affirmative action in other countries in respect to American properties there situated either in emulation or in retaliation. Thus a decision in this case is of great importance to the membership of the Association all of whom are concerned with foreign trade, and collaterally with foreign investments.

The brief, permission for the filing of which is sought by this motion, will point out that this Association has consistently been interested in the questions raised in this case and believes that a decision relative to these questions will, because of probable effect on the course of the foreign trade of this country, be of national importance.

WM. HARVEY REEVES,
Counsel for The National Foreign Trade Council, Inc.

CHARLES R. CARROLL.

p. 7.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1947.

Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Petitioner,
v.
Uebersee Finanz-Korporation, A. G.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 8, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent brought this suit to reclaim property which the Alien Property Custodian[1] acting under § 5 (b) of the Trading With the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1, as amended by the First War Powers Act of 1941, 55 Stat. 839, 50 U. S. C. App. Supp. V, § 5 (b), had vested in himself. Respondent is a corporation organized under the laws of Switzerland and having its principal place of business in that country. The property seized consisted of shares of stock in corporations organized under the laws of various States of this nation and of an interest in a contract between two such corporations.

The complaint alleges that respondent is not an enemy or ally of an enemy and that at no time at or since the vesting has the property in question been owned or controlled, directly or indirectly, in whole or in part, by an enemy, ally of an enemy, or a national of a designated enemy country. It also alleges that none of the property has been owing or belonging to or held on account of or for the benefit of any such person or interest. We construe these allegations to mean that the property is free

[1] The powers and functions of the Custodian were subsequently transferred to the Attorney General. Executive Order No. 9788, 11 Fed. Reg. 11981 (Oct. 14, 1946).

of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has any interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy. Those allegations, as so construed, are indeed taken as true for the purposes of the present ruling, since petitioner's motion to dismiss is based solely on the fact that respondent is a national of a foreign country.

The District Court granted petitioner's motion to dismiss. The Court of Appeals reversed, one justice dissenting. 158 F. 2d 313. The case is here on petition for a writ of certiorari which we granted because of the importance of the question in the administration of the Act. 330 U. S. 813.

Under the Act as it read prior to the 1941 amendment respondent would have been able to maintain this suit on a showing, without more, that it was a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies. That result would be reached as follows: Sec. 7 (c) permitted seizure by the Custodian only of property in which an enemy or ally of an enemy had an interest. Sec. 9 (a) permitted "any person not an enemy or ally of enemy" claiming an interest in any seized property to sue to reclaim it. And the Court held in *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, that a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies[2]

[2] Sec. 2 provides:

"That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that

could maintain such a suit even though the corporation was enemy owned or controlled. The scheme of the Act as it was then drawn was "to seize the shares of stock when enemy owned rather than to take over the corpo-

---

occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'

"The words, 'ally of enemy,' as used herein, shall be deemed to mean—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident, or whefever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'".

rate property." *Hamburg-American Co.* v. *United States*, 277 U. S. 138, 140.

That was at least one respect in which the Act had a "rigidity and inflexibility" that was sought to be cured by the amendment to § 5 (b) in 1941. See H. R. Rep. No. 1507, 77th Cong., 1st Sess., p. 3. It was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. They had through numerous devices, including the corporation, acquired indirect control or ownership in industries in this country for the purposes of economic warfare.[3] Sec. 5 (b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him "any property or interest of any foreign country or national thereof."[4] The prop-

[3] Some of the uses of the corporation in promotion of these subversive projects are summarized in Administration of the Wartime Financial and Property Controls of the United States Government, Treasury Dept. (1942), pp. 29–30. It is pointed out that technical legal title "to some of the most dangerous of the Axis-influenced enterprises may be Swiss, Dutch, Swedish or American." It is also said that "Actual ownership of business enterprises frequently runs through tangled mazes of holding companies. These holding companies were normally incorporated in neutral countries and the ownership of the holding companies themselves was normally represented by bearer shares, making it extremely difficult to negate a claim that the ownership of the corporation was coincident with the state of incorporation."

[4] Sec. 5 (b) (1), as amended, also granted the President the power to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ."

Sec. 5 (b) (1), as amended, further provided as respects property which had been vested that "upon such terms and conditions as

erty of all foreign interests was placed within reach of the vesting power not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts.

Thus the President acquired new "flexible powers" (H. R. Rep. No. 1507, *supra*, p. 3) to deal effectively with property interests which had either an open or concealed enemy taint.

While the scope of the President's power was broadened, there was no amendment restricting the scope of § 9 (a). As we have noted, § 9 (a) granted "any person not an enemy or ally of enemy," claiming an interest in property seized, the right to reclaim it. So the provision reads today. Yet, as petitioner suggests, if *Behn, Meyer & Co.* v. *Miller*, *supra*, is applied despite the 1941 amendment, § 9 (a) will undo much of the good which the 1941 amendment to § 5 (b) was designed to accomplish. All a corporate claimant would need do to recover the property seized would be to show that it was organized in this country or in some friendly or neutral country and was not doing business within the territory of an enemy or any of its allies.[5] The fact that it was owned or controlled by enemy interests and might sap the strength of this nation through economic warfare would be immaterial. We agree that a construction so destructive of the objectives of the 1941 amendment to § 5 (b) must be rejected.

Petitioner therefore suggests that once the seizure is shown to be permissible under § 5 (b), there is no remedy for the return of the property under § 9 (a). It is said that § 9 (a) was designed to provide an ultimate judicial determination of the question whether the property seized was within the vesting power defined in § 5 (b). *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 567–568. The argu-

---

the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States . . . ."

[5] See note 2, *supra*.

ment accordingly is that since § 5 (b) allows seizure and vesting of "any property or interest of any foreign country or national thereof," a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.

That is to make the right to sue run not to "any person not an enemy or ally of enemy" as § 9 (a) in terms provides but to "any person not an enemy or ally of enemy or national of any foreign country." That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in *Markham v. Cabell*, 326 U. S. 404, 410–411, "The right to sue, explicitly granted by § 9 (a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission." Such a drastic contraction, if not complete sterilization, of § 9 (a) as petitioner suggests should therefore be made only if no other alternative is open.

There are several reasons which make us hesitate to take that course. In the first place, as we have suggested, the phase of the problem with which we are presently concerned and with which Congress was wrestling when it amended the Act in 1941 started and ended with property having an enemy taint. We find not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis. Those interests were not waging economic warfare against us. Secondly, we are dealing here with the power "to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States."[6] Sen. Rep. No. 911, 77th Cong., 1st Sess., p. 2. It is hard for us to assume that Congress adopted that

[6] As to the powers of the custodian or other agency designated by the President over the property, see § 5 (b) (1), *supra* note 4, and § 12.

drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that § 7 (c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment.

The problem is not without its difficulties whichever way we turn. But we think that we adhere more closely to the policy of both § 5 (b) as amended and § 9 (a), if we do not carry over into the amended Act the consequences of *Behn, Meyer & Co.* v. *Miller, supra.*

As we have observed, the scheme of the Act when *Behn, Meyer & Co.* v. *Miller* was decided was to respect the corporate form, even though the enemy held all the stock of the corporate claimant. *Hamburg-American Co.* v. *United States, supra.* The 1941 amendment to § 5 (b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or of ally of enemy contained in § 2. They remain the same as they were at the time *Behn, Meyer & Co.* v. *Miller* was decided.[7]

Yet if the question were presented for the first time under the amended Act, we could not confine the statutory definitions of enemy or ally of enemy to the narrow categories indicated by *Behn, Meyer & Co.* v. *Miller.* To do so would be to run counter to the policy of the Act and be disruptive of its purpose. We are dealing with

[7] See note 2, *supra.*

hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible. *Markham v. Cabell, supra.* So if the definitions contained in § 2[8] are to be harmonized with the policy underlying § 5 (b) and § 9 (a) of the amended Act, we would have to say that they are merely illustrative, not exclusionary. To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.

There is perhaps in logic some basis for saying that that should be the consequence, since Congress did not amend § 2 when it revised the Act by its amendment of § 5 (b). The argument is that the only change effected was in § 5 (b) and that § 2 which stands unamended should be taken to mean what it meant before 1941. But the answer to our problem cannot be had by the use of logic alone. We are dealing here with conflict and confusion in the statute. Though neither § 2 nor § 9 (a) was amended with § 5 (b) in 1941, one of them must be read differently after than before that event. We believe it is more consonant with the functions sought to be served by the Act to apply § 2 differently than it was previously applied than to read § 9 (a) more restrictively. We believe a more harmonious reading of § 2, § 5 (b) and § 9 (a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make § 9 (a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy.

It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is

[8] See note 2, *supra.*

said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative[9] or judicial clarification.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

[9] See Pub. L. 322, 79th Cong., 2d Sess., adding § 32 (a) (2) (E) to the Act.